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In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL BANCARD CORPORATION,
Petitioner,

vs.

VISA U.S.A. INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES M. LANDIS
CHRIS S. COUTROULIS
ROBERT L. CIOTTI
(Counsel of Record)
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000

SANFORD M. LITVACK
ERIC J. LOBENFELD
DONOVAN LEISURE NEWTON &
IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

Whether a horizontal agreement among Visa's card issuing banks, fixing a discount to the price each will pay for receivables, escapes *per se* condemnation under Section 1 of the Sherman Act, 15 U.S.C. § 1, because it is claimed to promote efficiency?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, National Bancard Corporation ("NaBanco"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above proceeding on January 10, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 779 F.2d 592, and is reprinted in the appendix hereto (A 154-211). The opinion of the United States District Court for the Southern District of Florida (Hoeveler, D.J.) is reported at 596 F. Supp. 1231, and is reprinted in the Appendix hereto (A 1-153).

JURISDICTION

The judgment of the Eleventh Circuit was entered on January 10, 1986. The Eleventh Circuit's Order denying NaBanco's suggestions for rehearing *en banc* (A 212-13) was entered on February 18, 1986.

On April 29, 1986, Mr. Justice Powell ordered that the time for filing this petition for writ of certiorari be extended to and including July 18, 1986.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1) (1940).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

A. Visa's Issuer's Reimbursement Fee

In June, 1979, NaBanco filed suit against VISA U.S.A., Inc. ("Visa"), an association of independent financial institutions. NaBanco sought damages and injunctive relief under Section 1 of the Sherman Act, 15 U.S.C. § 1, as a result of Visa's uniform "issuer's reimbursement fee." That fee, which is jointly set by those banks which issue the Visa card, fixes a discount to the price paid by each such issuing bank when it purchases its cardholders'

receivables from merchant banks.[1] The merchant banks, which constitute more than eighty percent of the Visa members, "have no input in determining . . . the existence and amount of the [fixed discount]" (A 163) but are nevertheless required to accept the discounted price. NaBanco is the functional equivalent of a merchant bank. (A 164). At the time NaBanco's appeal was filed, the issuer's fee accounted for annual revenues to issuing banks of more than $300 million. (4:848-51).[2]

In addition to fixing the price paid by merchant banks to issuing banks, the issuer's fee has other significant anti-competitive consequences. For example, the fee sets a floor on the discount charged to merchants by merchant banks because that discount must always be no less than the fixed issuer's fee. (*E.g.*, Px. 1177; 8:1464; 13:2742). Since the issuer's fee is impermissably fixed by joint conduct, this leads to artificially increased prices by merchants who must cover the higher merchant discount rates they are charged. The net result is effectively to preclude certain classes of merchants with low profit margins (*e.g.*, supermarkets) from even accepting Visa cards as well as to artificially affect the price. (*E.g.*, 23:41, 57-58;

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1. Simply stated the system works as follows: a bank (the "issuing bank") issues a card to a consumer for use in retail purchases. Retailers sign-up with banks ("merchant banks") which accept charge slips from the retailers and pay them the amount of the charge less an individually negotiated discount. The merchant bank in turn sells the charge slip (the receivable) to the issuing bank at its face amount, less the discount fixed by Visa. (A 157-59). It is that discount—the issuer's reimbursement fee—which is the subject of this suit.

2. All citations to the Record reference a transcript volume and page number within that volume. For example, 25:96 indicates the Record at volume 25, page 96. All exhibits are referenced in the form, Px. .....

All emphasis in this petition for certiorari is supplied unless otherwise indicated.

8:1488). The issuer's fee gives issuing banks a substantial pricing advantage when competing with merchant banks for merchant business, because the issuing bank does not pay itself a fee on those transactions in which it is both the merchant bank and the issuing bank (so-called "on us transactions"). On the other hand, a merchant bank must pay that fee on 100% of the transactions it processes. (*E.g.*, Px. 1135; 9:1846-48). Further, the fixed nature of the issuer's fee (which generally constitutes about sixty percent of the total merchant bank's cost in handling Visa transactions) dampens any enthusiasm or interest the merchant banks have to innovate or improve productivity. (*E.g.*, Px. 1176; 3:590-92, 594).

B. District Court Proceedings

Following a bench trial, the district court validated Visa's price fixing. The court recognized that Visa's members were not truly joint venturers (since they did not share profits and losses or commingle management functions), and in fact acknowledged that they competed as "independent economic unit[s]" for cardholders and merchants. (A 84). It nonetheless concluded that Visa's horizontal price fixing was not *per se* illegal.

The court reasoned that, under *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979) ("*BMI*"), such price fixing was *per se* illegal only where, on its face, it would nearly always tend to restrict "output" rather than "contribute to the creation of 'economic efficiency.'" (A 83). The court believed that a fixed, uniform issuer's reimbursement fee promoted efficiency and the competitive success of the Visa association vis-a-vis other payment mechanisms.

Rejecting the *per se* rule for horizontal price fixing in this case, the district court went on to hold that Visa's fixed fee was valid under the rule of reason because Visa lacked market power in the broad relevant market Visa had urged, consisting of *all* payment systems, including *inter alia*, cash, checks, debit cards, automatic teller machines, traveler's checks and credit cards. (A 106-17).[3] Alternatively, the court held that the same factors which allegedly justified abandonment of the *per se* rule were procompetitive and necessarily outweighed the anticompetitive effects of the fixed price. (A 117-26).

C. Court of Appeals Decision

The Court of Appeals for the Eleventh Circuit affirmed the trial court's decision. The court accepted the district court's finding that the Visa members were not true joint venturers and were in fact separate economic entities in competition with each other. (A 164, 192 & n.16). The court also recognized that, in each of the horizontal price fixing cases after *BMI*, this Court had refused to view *BMI* in "sweeping terms" (A 183-84)—as the district court had done here—and instead had invalidated the price fixing at issue without inquiry as to whether it created efficiencies.[4] The circuit court nonetheless upheld Visa's price fixing. The court held that, since the fee "potentially could create an efficiency enhancing integration to which

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3. This market definition was vigorously opposed by NaBanco, which urged that, at its broadest, the relevant market should have been limited to national, general purpose credit cards.

4. *See* A 183-88 & 184 n.12, discussing non-application of *BMI* in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) ("NCAA"); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) ("*Maricopa*"); and *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

the restraint is ancillary," it could not be considered *per se* illegal. (A 182).

Applying the rule of reason, the circuit court first found Visa's price fixing "reasonable" because Visa lacked "market power" in the broad payment systems market found by the district court. (A 201-05, 209). The circuit court rejected application of this Court's holding in *NCAA* (468 U.S. at 109) that "[a]s a matter of law, the absence of proof of market power does not justify" horizontal price fixing, inexplicably characterizing the Court's language as "cryptic" and "mystifying." (A 202). The court went on to affirm the district court's alternative finding that, in any event, the reasons which justified avoidance of the *per se* rule also validated the fee under the rule of reason. (A 205-09).

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's Decision Conflicts With Seventy Years of Binding Precedent, Including This Court's Recent Decisions in Catalano, Maricopa and NCAA.

The Eleventh Circuit's decision sanctions horizontal price fixing by competitors who choose to call themselves a joint venture and claim their price fixing "potentially could create an efficiency enhancing integration to which the restraint is ancillary." (A 182). This holding is completely at odds with the decisions of this Court, emasculates the prohibition against horizontal price fixing under the antitrust laws of the United States, and, if allowed to

stand, will open the floodgates to complex, time-consuming full rule of reason trials in nearly every price fixing case where some "joint venture" or "efficiency" claim is asserted.[5] As the *Maricopa* Court put it, an argument that price fixing is not illegal *per se* even where it has procompetitive justifications "indicates a misunderstanding [of the law]. The antcompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." 457 U.S. at 351; *accord National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978) (Sherman Act "does not support a defense based on the assumption that competition itself is unreasonable").

Despite this Court's plain language, the Eleventh Circuit claimed that it was "without clear standards for determining the application of the *per se* rule in price fixing cases" and that, at the very least, "a factual inquiry into the restraint's competitive effect" was required. (A 168, 186). The circuit court's inability to find a guiding "standard" apparently stemmed from the fact that its reading of *BMI*—as requiring an inquiry into efficiencies—conflicted with this Court's three most recent price fixing cases, each of which, as the circuit court below acknowledged, had refused to examine "whether the [price fixing] agreement accomplished any efficiency creating integration." (A 183-88). Without any clear rationale, the circuit court decided to turn its back on these more recent holdings, and instead to rely upon its own broad reading of *BMI*—a reading it admitted this Court had declined to

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5. It is not too much to say that if there is an "efficiency" loophole in the ban on horizontal price fixing, there would likely be no case in which imaginative counsel could not find some "efficiency" to be litigated.

apply "*to any and all* subsequent applicants." (A 183-84 & n.12).[6]

However, this Court's post *BMI* decisions are neither surprising nor difficult to comprehend. As the Court has gone to pains to point out in each horizontal price fixing case since *BMI*, that case was not to be construed as a haven for price fixing schemes. Nor was it an invitation to litigants to transform all joint price fixing agreements into rule of reason inquiries. To the contrary, in reaching its result in *BMI*, this Court relied on the confluence of a number of unusual factors—none of which is present here. Specifically, *BMI* involved the setting of a price for the blanket licenses offered by the defendants, under which a purchaser acquired the rights to use all the musical compositions of various composers covered by the license. Thus, there was a true joint venture which set the price for a product sold by the joint venture itself—*not* the product of its individual members.[7] Further, if the plaintiff wished to avoid the fixed price, there was a realistic alternative—individual licenses from the composers. 441 U.S. at 24. And the price setting in *BMI* took place against the backdrop of the federal copyright statutory scheme which would be furthered by the activity (441 U.S. at 18-19), and an existing judicial consent decree which authorized the price

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6. The Court gleaned additional support from *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), an amazing stretch of a case which specifically limited its holding (that rule of reason rather than *per se* analysis should apply) to *non-price, vertical* restraints. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984) (declining invitation of amici to reconsider the long-standing *per se* rule against vertical price fixing).

7. This Court has subsequently stressed the importance of this distinguishing factor in *BMI*. *NCAA*, 468 U.S. at 113-14; *Maricopa*, 457 U.S. at 355-57.

fixing and effectively precluded members who benefitted from the fixed price from taking their own interests into account in setting it. *Id.* In short, to say *BMI* was unique is to understate the facts.[8]

This Court has, as the circuit court noted, been clear since *BMI* to limit that case to its peculiar facts. In *Catalano,* for example, the defendants had fixed a discount to the price of the product, just as Visa does here. Like Visa, they sought to avoid automatic invalidation of that price fixing by pointing to alleged procompetitive justifications for their arrangement and by relying on *BMI.* However, the *Catalano* Court summarily reversed the Ninth Circuit for its reliance on such justifications. 446 U.S. at 646-47; 457 U.S. at 347-48. As the Eleventh Circuit recognized here, the *Catalano* Court "summarily applied the *per se* rule and disposed of the case without . . . engag[ing] in the [efficiency creating] analysis suggested in *BMI.*" (A 186-87).

This Court's subsequent decision in *Maricopa* was fully consistent with its refusal in *Catalano* to engage in an analysis of purported procompetitive justifications. Once again, the Eleventh Circuit gave lip service to the fact that "[t]he [*Maricopa*] Court . . . indicated that *all price fixing was per se violative even if it created efficiencies.*" (A 187-88); *see Maricopa,* 457 U.S. at 351,

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8. In sharp contrast to the factors in *BMI,* Visa sets the discounted price its individual issuing members—not Visa itself—receive, and does so totally outside the purview of any governmental oversight and without furthering any statutory scheme. There is no realistic alternative to Visa's fixed discount: it directly affects every transaction interchanged through Visa's automated clearing house (the overwhelming majority of Visa transactions; 15:202; 20:20,57), and is the discount generally charged on transactions interchanged outside the Visa system since issuing banks have no incentive to accept a lower discount. (Visa Proposed Finding of Fact 83; *e.g.,* 38:132).

353 n.28. But the circuit court nevertheless disregarded *Maricopa,* holding that Visa's price fixing was not subject to *per se* scrutiny because of its purported efficiency creating potential. (A 188-99).

The *Maricopa* decision is directly on point and squarely controlling here. As Visa conceded in its Eleventh Circuit brief, the fact that "each doctor continued to sell his own services separately" and did not "pool . . . capital and share the risks of loss [and] opportunities for profit" with the other association members (as in a fully integrated joint venture such as a law firm or HMO) was the very reason for the *per se* invalidation of the association's price fixing scheme in *Maricopa.* (Brief of Appellee in the Eleventh Circuit, at 23). That is exactly the situation in the Visa association. Like the doctors in *Maricopa,* the issuing members of the Visa association who fix and receive the issuer's fee admittedly do *not* pool their capital or share the risk of losses associated with the issuance of credit cards. Instead, each issuing bank signs cardholders separately and issuing banks "compete vigorously against one another to issue cards and sign merchants." (A 164). Thus, as in *Maricopa,* the members of the defendant association are competitors, and agreements between them fixing price are, as they have been for seventy years, *per se* illegal.

Interestingly, in *Maricopa,* the Ninth Circuit (like the Eleventh Circuit here) was impressed by the defendants' claim that market imperfections made application of the *per se* rule inappropriate. 643 F.2d 553, 556 (9th Cir. 1980), *rev'd,* 457 U.S. 332 (1982). In particular, the defendants showed that, because the demand and supply curves for medical care were artificially high in relation to a purely competitive industry, medical services and hence

medical insurance would be priced at a higher level in the absence of the fixed price. Upon review, this Court squarely rejected the Ninth Circuit's approach. The Court instead held that any claimed deviance of the demand and supply curves present in the health care industry from a purely competitive model, as well as any effect on the validity of the presumptions which underlie the *per se* rule, could not be asserted as a reason for not applying that rule. 457 U.S. at 350-51. As the Court clearly explained, "claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application." *Id.*, at 351. The Court went so far as to state, "[f]or the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Id.*, at 344.

In sharp contrast to that reasoning, the Eleventh Circuit has created an unknown and elusive standard for allowing horizontal price fixing to escape the *per se* rule: whether it "*potentially* could create an *efficiency enhancing integration* to which the restraint is ancillary." (A 182). This new rule would, if allowed to stand, open all price fixing cases, which have traditionally been dealt with under the *per se* standard, to full rule of reason inquiry. The potential for mischief is enormous. If price fixing—the most insidious and well recognized form of antitrust violation—were now to be transformed into another excursion into a "reasonableness" inquiry, then the scope and reach of antitrust doctrine would be radically altered. Nothing in the case law or logic supports this result.

Finally, *NCAA* put to rest any lingering doubt whether the *BMI* decision is confined to its unique facts. There again, as the Eleventh Circuit acknowledged, this Court "refused to extend *BMI* to the *NCAA*." (A 184 n.12). In *NCAA*, this Court held that where, unlike here, the case involved an "*industry* in which horizontal restraints on competition are essential if the product is to be available at all," a defendant should be allowed to attempt to carry its "heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." 468 U.S. at 101, 113. Of course, in that case, the burden was not satisfied since the NCAA was setting the price to be paid to the *individual* members for their games (*id.* at 113) —just as Visa sets a discount to the price paid by individual issuing banks.[9]

To summarize briefly, the decision below is not merely wrong; it is, we submit, dangerous. By permitting price

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9. Moreover, there is no question that the payment mechanism industry does *not* require horizontal restraints on competition for their products to be available. National, general purpose credit cards—the same type of payment mechanism as Visa provides—have been and continue to be offered by single entities, including in some cases by individual Visa members (*e.g.*, the Choice card and Carte Blanche card by Citibank, a Visa member; the Discover card by Sears; the American Express card). (A 108-09; 4:868-69; 23:88-89).

The fixed fee is also unnecessary to the offering of Visa cards. The district court accepted Visa's argument that the fixed fee promoted "universality of acceptance"—*i.e.*, the acceptance by each issuing bank of its cardholders' paper without demanding an exorbitant discount. However, it is facially obvious that "universality of acceptance" would also have been achieved, for example, by a rule requiring card issuing members to accept their cardholders' receivables upon presentment, without also fixing a discount—in favor of the issuing banks—to the receivables' face amounts.

fixers to evade the *per se* rule by merely invoking the rubric "joint venture," or by positing so-called potential efficiencies, the Eleventh Circuit's decision in this case poses a severe threat to the long standing proscription on price fixing. Indeed, the Eleventh Circuit has said and done what no court has. Claiming it is "without clear standards for determining the application of the *per se* rule in price fixing cases," that court has taken it unto itself to fashion its own test, namely, whether the conduct "potentially could create an efficiency enhancing integration." That amorphous, open-ended standard, which ignores the teaching of *Catalano*, *Maricopa* and *NCAA*, would (if accepted) lead to the kinds of "defenses" to charges of price fixing which this Court laid to rest long ago. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). Accordingly, the decision should not be allowed to stand.

CONCLUSION

For the above reasons, petitioner respectfully submits that this petition for writ of certiorari should be granted.
Dated: July 18, 1986

Respectfully submitted,

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000

By: .....
JAMES M. LANDIS

By: .....
CHRIS S. COUTROULIS

By: .....
ROBERT L. CIOTTI

DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

By: .....
SANFORD M. LITVACK

By: .....
ERIC J. LOBENFELD
Counsel for Petitioner